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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 817

THOMAS F. BUCK and MARY P. BUCK,

Appellants,

vs.

STATE OF NEW JERSEY,
by the State Highway Commissioner,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

Motion to Dismiss

Pursuant to Rule 16(b) of this Court, the Attorney General of the State of New Jersey, on behalf of the State of New Jersey, and the Commissioner of Transportation of the New Jersey Department of Transportation (formerly State Highway Commissioner) moves to dismiss this appeal on the grounds that the constitutionality of the statute

under attack was not raised properly before the State court and that the questions presented are so unsubstantial as not to require further argument.

Opinion Below

The oral opinion of the Law Division of the Superior Court of New Jersey is not reported but the same is reproduced as Appendix C of Appellants' Jurisdictional Statement. The opinion of the Appellate Division of the Superior Court of New Jersey affirming the decision of the trial court is reported at 94 N. J. Super. 84, 226 A. 2d 840, and is reproduced as Appendix B of Appellants' Jurisdictional Statement. The order denying Appellants' Petition for Certification of the Supreme Court of New Jersey is reported at 49 N. J. 359, 230 A. 2d 393 and is reproduced as Appendix A of Appellants' Jurisdictional Statement.

Questions Presented

1. Where the constitutionality of the State statute is not raised in proper or timely manner before the State courts, will this Court accept jurisdiction?
2. Have Appellants raised a substantial question under the Constitution of the United States by merely asserting that the same exists without demonstration thereof?
3. Will this Court overturn the legislative enactment of the State of New Jersey where that enactment is in accord with the Constitution of the United States as interpreted by this Court and where there is no showing of unconstitutionality or invalidity by Appellants?
4. Where a judge of the Law Division of the Superior Court of New Jersey makes a determination as to

relative valuation only and where Appellants' rights to full hearing on the ultimate question of just compensation have not been abridged or impaired in any way does Appellants' unfounded assertion of denial of due process raise a substantial question under the Constitution of the United States?

Statement of the Case

A. The Decision of the Law Division of the Superior Court of New Jersey.

On November 18, 1965 the State of New Jersey, by the State Highway Commissioner filed complaint in condemnation in the within cause. By this complaint the State sought to condemn certain property of Appellants Buck in Harding Township, Morris County, New Jersey. This property is shown on the condemnation map as Parcels 30A and 30B.

On January 20, 1966 the defendant filed his answer in this cause, contesting the State's right to take the parcel known as 30B, which is an oblong parcel approximately 60 feet in width and approximately 574.13 feet long. Defendant also contested the State's right to take another portion of the property, but has since waived as to that portion.

On the return date of the Order to Show Cause defendant appeared and the issue of the State's right to take was set down for a special hearing.

On March 1, 1966 this matter first came on to be heard before the Honorable Alexander P. Waugh, Assignment Judge, Superior Court of New Jersey. At that time, after lengthy colloquy and the testimony of one witness, a State Highway Engineer, it was determined that the matter be further adjourned and that the State prepare maps indicat-

ing the actual line of the right of way proper. This was done and the said maps were received into evidence by way of stipulation. The effect of this was to slightly enlarge the area in dispute to include 30B together with a small portion of 30A running along the northernmost border of 30B. The disputed segment was thereby enlarged from an area of approximately eight-tenths of an acre to an area of slightly over one acre. It was stipulated that local zoning regulations require a minimum lot size of 3 acres. The hearing was resumed on March 30, 1966 and testimony continued to be taken on March 31, 1966. It was developed during these days of testimony that immediately adjacent to the Buck property on the west, there is a parcel of land owned by Robert Sheldrick and Dorothy Sheldrick, his wife. This large and valuable parcel will be rendered completely landlocked by Route 287, which is a limited access highway and which is the same highway for which Appellants' land will be taken. In order to avoid a creation of a remnant parcel and to rectify the landlocked condition of the Sheldrick remainder and provide access to this parcel of 5.3 acres the State determined to acquire the comparatively worthless, unusuable 1.07 acre sliver which is the subject of this appeal. The Sheldrick acreage will then be available for development, and at the same time the State will be relieved of the burden of making compensation to the Sheldricks for this remainder of over 5 acres. Testimony below was clear that this solution was most economical of public funds as well as most inducive to maximum land use in the area.

It was further developed that the cost to the State of acquiring the entire parcel would be practically equivalent to the cost of acquiring only that portion which is not in dispute. Judge Waugh found as a matter of fact that the credible evidence was that acquisition of the whole would cost $46,000 and that acquisition of the portion within the

right of way proper would cost the State $45,000. It was not disputed at trial nor is it contested on appeal that these figures are "practically equivalent" within the meaning of N.J.S.A. 27:7A-4.1.

The trial court found that all the requirements of that statute had been complied with, and moreover that under the theory of *State* v. *Davis*, 87 N. J. Super. 377 (App. Div. 1965) certif. denied 46 N. J. 135 (1965), the State was also acting within its discretionary powers. Accordingly, on April 7, 1966, Order for Judgment and Appointing Commissioners was entered, permitting the State to acquire all of the Buck property, including the 1.07 acre, oblong parcel which is the subject matter of this appeal.

B. The Decision of the Appellate Division of the Superior Court of New Jersey.

On May 20, 1966 Appellants appealed the Order for Judgment and Appointing Commissioners to the Appellate Division of the Superior Court of New Jersey. On February 20, 1967 the Appellate Division unanimously affirmed the order of the trial court in a written opinion. The court stated therein after a careful analysis of the facts that the proofs amply supported the findings and conclusions of the trial judge. The Appellate Division went on to point out that where a remainder portion such as the area presently in dispute is created which is rendered too small to comply with the zoning ordinance, the State is justified in acquiring such a remnant in order to avoid the expense of litigating the damage to the remainder and to avoid the creation of landlocked parcels or parcels that do not comply with local zoning requirements. The court found that this was especially so when in so doing the Commissioner is able to employ this otherwise useless strip to preserve access to adjoining lands which have an apparent potential for de-

velopment. The Appellate Division cited numerous authorities for the well-settled proposition that the mere fact that a neighboring property owner's interests may be served will not defeat the State's right to acquire where the paramount reason for the acquisition is for a public use. The Appellate Division was careful to confine its opinion to those cases falling within the requirements of N.J.S.A. 27:7A-4.1 and concluded that the Commissioner acted in the best interests of the public and within the statutory authority vested in him.

C. The Decision of the Supreme Court of New Jersey.

Appellants petitioned the Supreme Court of New Jersey for certification to review the said order of the Appellate Division. On April 19, 1967 the Supreme Court of New Jersey denied Appellants' Petition for Certification thereby deciding inferentially that no substantial question was presented thereby. Rules of the New Jersey Courts Rev. Rule 1:10-2.

It is this denial which Appellants seek to appeal to this Court.

Summary of Argument

Appellants made no attack on the constitutionality of N.J.S.A. 27:7A-4.1 before the trial court or the Appellate Division. Nor did they raise such issue in any pleadings filed in the within matter until their Petition for Certification before the Supreme Court of New Jersey. The rules of court of the New Jersey Supreme Court as well as appropriate New Jersey authority states that the New Jersey Supreme Court is not bound to consider constitutional issues not raised properly below. Accordingly, Appellants did not draw into question the validity of the statute now under attack in a manner consistent with Title 20 United States Code, Section 1257 (2).

Appellants' unfounded assertion that substantial questions arise under the Constitution of the United States is without merit. An examination of appropriate authority both judicial and academic reveals that what Appellants charge is a "private use" intended for the property in question is in fact a well-settled public use even without regard to specific statutory authority. Appellants' untimely attack upon the constitutionality of the statute under consideration is further totally without substance in that this Court has decided that where the legislature determines that a particular taking is in furtherance of a public use this Court will not review this determination. *Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954); *U. S. ex rel. TVA* v. *Welch, et al.,* 327 U. S. 546, 90 L. Ed. 843 (1946).

Further Appellants have totally failed to demonstrate the basis for their claim that N.J.S.A. 27:7A-4.1 is unconstitutional even if judicial review were deemed appropriate.

ARGUMENT

POINT I

The Appellants did not attack the constitutionality of N.J.S.A. 27:7A-4.1 in proper or timely fashion before the State courts and they therefore cannot attack the same on appeal to this Court.

Appellants made no attack on the constitutionality of N.J.S.A. 27:7A-4.1 before the trial court, nor did they raise that issue in their answer. New Jersey Rules provide that any matters which Appellant seeks to bring before the Appellate courts which were not raised below must be appropriately noted. The appropriate portion of the applicable section is reproduced below.

> Rev. Rule 1:7-1 (c) ". . . If the questions involved include any not presented to the court below, this fact shall be noted. The foregoing requirements are to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

Appellants neither made such a notation nor did they directly attack the validity of the said statute before the Appellate Division of the Superior Court. They first impugned the constitutionality of the statute in their petition for certification before the New Jersey Supreme Court, again without appropriate notation. Accordingly, the New Jersey Supreme Court was not bound to consider that issue. *Lettieri* v. *State Board of Medical Examiners*, 24 N. J. 199 (1957).

Therefore Appellants have not complied with the rules of this court, in that they did not raise the very issue upon which they base the present appeal in proper or timely manner before the State courts, as required by Title 20 United States Code, Section 1257 (2).

Appellants argue that they did in fact make such argument, but an examination of the record indicates that all they did was assert the principle that private property may only be taken for public use; and only before the New Jersey Supreme Court did they attempt to draw from that principle the conclusion of statutory invalidity for which they now contend, and at that point the court was not bound to consider it. Before both the trial court and the Appellate Division Appellants elected to utilize this constitutional doctrine only to attempt to persuade those tribunals of the construction of the statue, not of is invalidity. *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, 259.

Accordingly, the appeal is defective and should be dismissed.

POINT II

The questions presented by the present appeal are so unsubstantial as not to require further argument.

A.

The questions presented by the present appeal are totally without merit and unsubstantial. The State of New Jersy did not contend at trial, or before the Appellate Division of the Superior Court of New Jersey or before the New Jersey Supreme Court that private property may be acquired for other than public use, nor does the State so contend here.

Appellants argue that the proposed roadway to be constructed on the disputed property is for "the admitted exclusive use of another." This is simply not true. The roadway will be in public ownership and open to use by the public at large, including but not limited to the landlocked neighbor, Sheldrick. It is a matter of well-settled law that a use is not denominated public or private by mere reliance upon the number of persons it serves. See *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 726-728 (Ch. 1832), cited with approval in *Texas Pipe Line Co.* v. *Snelbaker*, 30 N. J. Super. 171, 176-178 (Law Div.), affirmed 33 N. J. Super. 11 (App. Div. 1954); *Essex County* v. *Hindenlang*, 35 N. J. Super. 479, 488-491 (App. Div. 1955), appeal dismissed 24 N. J. 517 (1957); *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 706-707, 43 S. Ct. 689, 67 L. Ed. 1186, 1192 (1923); *In re Legislative Route 62214, Section 1-A*, 299 A. 2d 1 (1967); 2 *Nichols, Eminent Domain* (revised 3d ed. 1963), §7.512 (1), pp. 705-706, 5A Thompson, Real Property (1957 replacement), §2577, pp. 658-660. It has been stated that a use does not "fail to be public upon the ground that the immediate enjoyment of it

is limited to a small group or even to a single person." *United States* v. *Boyle,* 52 F. Supp. 906, 908 (N. D. Ohio 1943), affirmed sub nom.; *Cleveland* v. *United States,* 323 U. S. 329, 65 S. Ct. 280, 89 L. Ed. 274 (1945). Accord, *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 161-162, 17 S. Ct. 56, 41 L. Ed. 369, 389-390 (1896). Numerous cases from several jurisdictions support the view that where the condemnor creates a landlocked remainder ancillary to road construction, it is a public use for the condemnor to cure that condition by providing access through the lands of another, even absent specific statutory authority. *State* v. *Davis,* 87 N. J. Super. 377 (App. Div. 1965), certif. denied, 46 N. J. 135 (1965); *May* v. *Ohio Turnpike Commission,* 178 N. E. 2d 920, 921 (O. Sup. Ct. 1962); *Tracey* v. *Preston,* 178 N. E. 2d 923, 924 (O. Sup. Ct. 1962); *Luke* v. *Massachusetts Turnpike Authority,* 337 Mass. 304, 149 N. E. 2d 225, 228 (1958); *Pitznogle* v. *Western Maryland R. Co.,* 87 Atl. 917, (Md. Ct. of App., 1913); *People ex rel. Dept. of Public Works* v. *Chevalier,* 340 P. 2d 598, 52 Cal. 2d 299 (1959).

Appellants are compelled to ignore this long line of judicial and academic authority in order to assert without demonstration that there is a substantial question presented by this appeal. They have also had to ignore the plain sense of the situation. They profess a fear that the present case stands as precedent for the acquisition of private property "for any use whatsoever." This is patently an unfounded apprehension. The New Jersey Courts clearly confined their opinion to those cases falling within the ambit of N.J.S.A. 27:7A-4.1 and the rigorous criteria imposed of that statute. There can be no serious argument otherwise.

The New Jersey legislature was careful in drafting the statute now under attack to impose two sets of conditions

precedent to the exercise of the administrative discretion delegated therein. The remainder parcel must be either rendered landlocked, or so situated as to render the cost of acquisition of the whole practically equivalent to the cost of acquisition of the portion needed for the right of way proper. Only after one or the other of these criteria has been met may the Commissioner acquire the remainder, and then only if the interest of the public will be best served thereby. Every judicial echelon in New Jersey has agreed that both sets of criteria have been satisfied in the present matter.

It is significant to note that the statute under attack is not part of the general condemnation act of New Jersey, as Appellants erroneously claim. The general condemnation act is to be found in Title 20 of the Revised Statutes of New Jersey; the present statute on the other hand is specifically directed to freeways or parkways, and its intent is to ease some classes of public burden created by the advent of such limited access highways, and at the same time to enable the integrated development of the general plan for their construction.

Appellants now ask this Court to declare that the legislature of New Jersey is powerless to direct that course of action which is at once most economical of public funds; which avoids the creation of unusable and virtually worthless remnant parcels; and which is most conducive to maximum utilization of land resources for the community at large.

In order to prevail in this request they have relied heavily on certain dicta in *Cincinnati* v. *Vester,* 281 U. S. 439, 74 L. Ed. 950 (1930). In so doing they have ignored the main thrust of that decision. The factual findings there before the court were that the "excess takings" in that case could not be justified on the theory of avoidance of

remnant lots or on the preservation of the improvement, the very grounds on which the present statute proceeds. Even so, however, this court expressly declined to pass upon the constitutionality of the very broad municipal ordinance there challenged, and rested its opinion entirely on the finding that the proceedings were not taken in conformity with applicable State law. Appellants in the present matter make no such claim.

Even in that portion of the opinion upon which Appellants rely, however, the court recognizes the great weight which will be accorded to State legislative declarations and "in particular the judgments of State courts as to the uses to be considered public in the light of local exigencies." 281 U. S. *Id.* at p. 446.

In the present matter, unlike *Vester,* we have a clear statement of legislative intent as well as a series of decisions on the very case *sub judice* at every level of the New Jersey courts. See also *State* v. *Davis, supra.* It is appropriate that the legislature of New Jersey, perhaps the most densly populated State in the Union, should be concerned with preventing readily avoidable waste of its precious land resources in unusable remnants and landlocked acreage. Local law, both legislative and judicial, as well as the force of local needs and conditions uniformly supports the validity of the statute under attack, even under the very broad interpretation of the *Vester* case for which the appellants contend.

That interpretation however, if it was ever appropriate, has been devastated by much more recent decisions of this Court. For example, in *Berman* v. *Parker, supra,* Mr. Justice Douglas, speaking for a unanimous court stated:

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size

> of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

The *Parker* case dealt with slum clearance and this court determined that it would not inquire into the redevelopment agency's propriety in acquiring admittedly non-slum real estate (a department store) in order to achieve a balanced community. In the present case, the State of New Jersey is attempting to further its massive road building program in accordance with its general plan of following that course of action which is most economical of public monies; most conducive to achievement of maximum efficiency in land use; and which avoids creation of unusable, and unsightly remnants bordering our highways, and burdening our public. Just as this Court recognized the inherent connection between eradication of slums and the overall community development, there is a similar vital link between the construction of a limited access highway and the avoidance of land remnants or landlocked parcels created by that very construction.

The present case presents no occasion for departure from the holding of *Parker* that the question of what constitutes a public use is a legislative rather than judicial one.

The other cases cited by Appellants re-affirm rather than contradict the State's contentions herein. New Jersey earnestly submits that where its legislature has spoken with such specificity and restraint that the Court should continue to follow its honored practice of deeming the legislative declaration conclusive. As Mr. Justice Black said in delivering the majority opinion in *U. S. ex rel. T.V.A.* v. *Welch, supra* at p. 551, *et seq.*

"We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 679. It is true that this Court did say in *Cincinnati* v. *Vester*, 281 U. S. 439, 446, that "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville & Western R. Co.*, 208 U. S. 598, 607, this Court, referring to the "rule" later stated in the *Vester* case, said that "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws." And see *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 257, 260-261. But whatever may be the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject "Its decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields. See *Case* v. *Bowles*, 327 U. S. 92, 101; *United States* v. *New York*, 326 U. S. 572."

B.

The second point raised by Appellants to the effect that the statute imposes on the trial court the duty to usurp the function of commissioners in determining value is totally devoid of any merit or substance whatsoever. A reading of the statute and of the trial judge's opinion makes it perfectly clear that the statute did not require nor did the trial court find absolute value. The only issue was the relative value of the whole parcel as compared to the value of the portion within the normal right of way. The trial judge was careful to state that he in no way was deciding the ultimate issue of compensation (App. c. p. 9A) but was merely determining the issue of practical equivalence raised by the statute.

Appellants create the patently false impression that somehow they are to be denied a commissioners' award and the right of appeal therefrom to a jury. It is the Order Appointing Commissioners from which these Appellants appeal. As soon as the present appeal is determined commissioners will be appointed and the matter will be processed in precisely the same manner as any other condemnation case. *State* v. *N. J. Zinc Co.*, 40 N. J. 560, 572 *et seq.* (1963).

By having taken the matter to appeal the appellant's rendered it impossible to proceed; they now claim for the first time that failure to proceed is a denial of due process. It is difficult to imagine an argument which is less just, less reasonable, or less substantial.

CONCLUSION

The law is well settled that the determination of what constitutes a public use is a legislative one. Appellants have failed to point to even one case where this Court has held that such a legislative determination has exceeded constitutional boundaries. Appellants have further failed to make out any case for their allegations of substance in the present matter. The decisions of the New Jersey Courts being clearly correct it is respectfully urged that the present appeal be dismissed.

Respectfully submitted,

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